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UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

ORACLE USA., INC., a Colorado corporation,
 ORACLE AMERICA, INC., a Delaware
 corporation; and ORACLE INTERNATIONAL
 CORPORATION, a California corporation,

Plaintiffs,

v.

RIMINI STREET, INC., a Nevada corporation;
 and SETH RAVIN, an individual,

Defendants.

Case No. 2:10-cv-0106-LRH-PAL

**PLAINTIFFS ORACLE USA, INC.,
 ORACLE AMERICA, INC., AND
 ORACLE INTERNATIONAL
 CORPORATION'S MOTION TO
 DISMISS FIRST AMENDED
 COUNTERCLAIM AND STRIKE
 AFFIRMATIVE DEFENSE**

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**PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS AND
STRIKE AFFIRMATIVE DEFENSE**

Plaintiffs Oracle USA, Inc. ("Oracle USA"), Oracle America, Inc. ("Oracle America") and Oracle International Corporation ("OIC") (together "Oracle" or "Plaintiffs") file this motion pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6) to dismiss the First Amended Counterclaim of Rimini Street, Inc. ("Rimini"), asserting claims of (1) defamation, business disparagement and trade libel; (2) declaratory relief as to copyright misuse; and (3) violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200. Plaintiffs also move pursuant to Rule 12(f) to strike Rimini's fourth affirmative defense of copyright misuse.

I. INTRODUCTION

Rimini has asserted three counterclaims. Oracle moved to dismiss those counterclaims, and Rimini responded by filing its First Amended Counterclaim, adding new allegations in an attempt to rectify the shortcomings identified in Oracle's first motion to dismiss.¹ Despite taking the opportunity to amend, Rimini has not cured the flaws in its counterclaims, and they should be dismissed without leave to further amend.

In support of Rimini's first claim, which alleges defamation and trade libel, Rimini identifies only four specific alleged defamatory statements. One of those statements indisputably was made after this lawsuit began, and indeed after Rimini filed its counterclaims. Because that statement merely reports to the press what Oracle asserts in this lawsuit, it is subject to the litigation privilege and cannot be the basis for a claim. The only other specific bases for Rimini's claim are (1) an alleged statement that Rimini's "business model was presently unsustainable and that Rimini would not still be in business in two years"; (2) an alleged statement that "Oracle had information that, when disclosed, would put Rimini Street out of business"; and (3) an alleged "insinuation" that Rimini practices are illegal. (CC ¶¶ 46-47.) As

¹ Citations to Oracle's Amended Complaint and to the Answer to Oracle's First Amended Complaint and First Amended Counterclaim are in the form of (AC ¶ __) and (CC ¶ __) respectively.

a matter of law, the statements Rimini alleges are merely opinion and cannot form the basis of a claim.

Rimini's second claim seeks declaratory relief on the affirmative defense that Oracle misused its copyrights. Rimini does not allege that Oracle has prevented Rimini from developing any new work or product. Nor does Rimini allege that Oracle requires its customers to agree not to do business with Rimini. Instead, the only conduct that Rimini alleges is that Oracle limits access to and use of Oracle's copyrighted works. As a matter of law, that is not copyright misuse. Further, Rimini asserts that Oracle's exercise of its statutory rights "effectively" prevents Rimini and other service providers from winning over Oracle customers. Not only is such a claim contrary to settled law, but Rimini alleges no facts to support it. Moreover, the facts that Rimini does allege – such as the assertion that hundreds of customers have already "made the switch to Rimini" – are flatly contrary to any conclusion that Oracle's terms of use "effectively" prevent customers from switching from Oracle to Rimini. For these same reasons, Rimini's affirmative defense of copyright misuse should be stricken as well.

Rimini's third claim, for violation of California's Unfair Competition Law, rests entirely on the same allegations of supposed defamatory insinuations and of copyright "misuse." For the reasons stated above, Rimini has failed to plead any defamatory conduct and has failed to plead copyright misuse, and thus the Unfair Competition Law claim also must also fail.

II. SUMMARY OF ALLEGATIONS

A. Oracle's Complaint

Oracle is the world's largest enterprise software company. (AC ¶ 25.) Oracle earns revenue by licensing software to businesses and by providing support services, among other things. (*Id.*) Customers purchasing Oracle support services receive access to software support materials, such as software patches, bug fixes, documentation, and updates, as well as technical assistance. (*Id.* ¶ 5.) Rimini holds itself out as a competitor to Oracle in providing support to companies that license certain Oracle enterprise software applications. (*Id.* ¶¶ 34-35.)

Oracle asserts in this action copyright infringement and other claims against Rimini and its founder and CEO, Seth Ravin. Rimini's business is built on systematic theft of Oracle's

intellectual property, including illegal downloading of Oracle’s copyrighted software and support materials. (*Id.* ¶ 5.) Rimini typically logs on to Oracle’s password-protected technical support websites using a customer’s credentials, then downloads Oracle material in excess of the customer’s authorization under its license agreement; Rimini has admitted to downloading “tens of thousand files for a single customer.” (*Id.* ¶¶ 39-48, 57-60; CC ¶ 26.) Rimini also acquires copies of its customers’ licensed Oracle enterprise applications software, makes illegal copies of this software, and uses those copies in various illegal ways to offer low-cost support and induce Oracle’s customers to cancel their support contracts with Oracle in favor of Rimini. (AC ¶¶ 9, 33-38; 75-79.)

Rimini is Mr. Ravin’s second illegal business. His last venture, TomorrowNow, provided the same types of support services as Rimini. TomorrowNow was purchased by one of Oracle’s major competitors, SAP AG (“SAP”). SAP eventually shut down TomorrowNow and admitted that during Mr. Ravin’s management, TomorrowNow engaged in illegal copying of Oracle’s intellectual property and illegally accessed Oracle’s computer systems. (*Id.* ¶¶ 10-11, 49-50.)

B. Rimini’s Counterclaim

Rimini’s counterclaim largely makes one point: Rimini denies the allegations of Oracle’s Complaint, and Rimini will “aggressively defend” against Oracle’s claims. (CC ¶ 8; *see also id.* ¶¶ 2-8.) Rimini makes its defense stridently, going so far as to accuse Oracle of asserting “malicious” and “knowingly false” claims. (*Id.* ¶¶ 1-2.)

Rimini follows these assertions with paragraphs that read remarkably like Rimini’s marketing materials – alleging that “[h]undreds of Fortune 500, mid market, small and public sector organizations around the world have already made the switch to Rimini,” that Rimini is Oracle’s “fastest-growing” and “[p]rimary competition for after-market support,” that Rimini is “threatening Oracle’s market control and pricing power,” and that Rimini supposedly is able to offer better service than Oracle at half the price. (*Id.* ¶¶ 10-19, 31-36.)

Oracle disputes Rimini Street’s allegations that its success is the product of anything other than its unlawful conduct and, at the appropriate time, will prove the allegations of its Amended Complaint – that Rimini’s growth and low prices have been based on its illegal copying of

1 Oracle's intellectual property and other wrongful acts.

2 Rimini further says that it has "counterclaimed herein so as to end Oracle's five year
3 campaign of illegal anticompetitive tactics," (*id.* ¶ 8), but when it comes time to back up its
4 rhetoric with substance, it fails to plead facts sufficient to state any claims.

5 Rimini alleges three causes of action. The first is for "defamation, business
6 disparagement, and trade libel." (*Id.* ¶¶ 43-58.) In support of this claim, Rimini makes reference
7 to a number of supposed "defamatory statements," but does not attempt to provide particulars –
8 who made them, to whom, or the substance of what was said – with only four exceptions.
9 (CC ¶¶ 44-48.)

10 First, Rimini quotes press articles that, in turn, quote Oracle spokesperson Deborah
11 Hellinger's statements to the press. (CC ¶ 45.) These articles are incorporated by reference into
12 Rimini's counterclaim and are therefore properly considered on a motion to dismiss. *See Knievel*
13 *v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). What the articles show is that Rimini proclaimed
14 the filing of its Counterclaim to the press, the press sought a response from Oracle, and Ms.
15 Hellinger responded to those media requests by providing a statement by e-mail. As the press
16 accounts show, Ms. Hellinger responded by saying that Oracle "is committed to customer choice
17 and vigorous competition, but draws the line with any company, big or small, that steals its
18 intellectual property," and that "The massive theft that Rimini and Mr. Ravin engaged in is not
19 healthy competition. We will prove this in court." (Declaration of Kieran Ringgenberg Ex. A.;
20 *see also id.* Ex. B.)

21 Second, Rimini alleges that Juan Jones of Oracle told one potential Rimini customer in
22 the "Spring of 2010" that "Rimini Street's business model was presently unsustainable and that
23 Rimini Street would not still be in business in two years." (CC ¶ 46.)

24 Third, Rimini alleges that, in the winter of 2010, unspecified "Oracle executives" met
25 with executives from the CD Group and stated that "Oracle had information that, when
26 disclosed, would put Rimini Street out of business." (CC ¶ 47.)

27 Fourth, Rimini alleges that, "in approximately March of 2009," an unidentified "Oracle
28 representative" contacted an industry analyst and made unspecified statements "insinuating that

1 Rimini Street's business practices were illegal." (CC ¶ 48.)

2 Rimini asserts the supposed statements were "false" (*id.* ¶¶ 49-50) and then goes on to
3 make a number of allegations aimed to show that certain of Rimini's practices were legal. (*Id.* ¶¶
4 51-56.) Rimini also alleges that Oracle is aware Rimini was behaving lawfully because, in
5 substance, Rimini told Oracle so, and because Rimini supposedly offered to permit a third party
6 to audit unspecified practices. (*Id.* ¶ 57.)

7 Rimini second claim is for declaratory relief based on the affirmative defense of
8 copyright misuse. Rimini makes no claim, however, that Oracle has attempted to extend
9 copyright protection to materials that are not subject to copyright protection. Rimini concedes
10 that Oracle's distribution of Software and Support Materials via its websites are subject to
11 "browser-wrap" or "click-wrap" agreements, and alleges that Oracle "has attempted" to use the
12 "design of its support website" and the agreements to "interfere with a customer's ability to
13 select a support vendor other than Oracle." (*Id.* ¶ 62.) However, Rimini alleges only two
14 specific acts that arguably relate to its copyrights. First, it alleges that Oracle has prohibited the
15 use of "automated tools" to download "significant volumes" of materials from Oracle's website
16 (*id.* ¶ 64); that is to say, Rimini complains that Rimini cannot copy Oracle's intellectual property
17 as easily as Rimini would like. Second, Rimini also alleges that Oracle "prohibits access to and
18 download of support materials unless such access or download 'is in furtherance of the
19 relationship between customer and Oracle,'" (*id.*), which Rimini says represents Oracle's
20 "systemic use of anticompetitive tactics to try and maintain a stranglehold over its customers by
21 effectively requiring them to either continue purchasing after-market support only from Oracle or
22 forego critical support materials to which they are entitled and for which they have already paid."
23 (*Id.*) Rimini alleges that the provision "gives Oracle a substantial and unfair advantage over its
24 support and maintenance competitors." (*Id.* ¶ 66.) Rimini does not allege any facts explaining
25 how, in light of the alleged "systematic" measures that "effectively require[]" customers to
26 purchase support only from Oracle, "[h]undreds" of customers have nonetheless "made the
27 switch" to Rimini. (*Id.* ¶¶ 10, 64.)

Rimini's third cause of action is for violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200. Rimini contends that Oracle engaged in "fraudulent business practices" based on allegations that "Oracle caused false and disparaging allegations to be published and republished by Oracle and its agents." (CC ¶ 71.) But Rimini does not identify what these supposed allegations were. (*Id.*) Although Rimini further alleges that "Oracle has also employed unlawful and/or fraudulent business practices in its dealings with industry analysts, reporters and Rimini Street's customers and potential customers" (*id.* ¶ 72), it does not allege any facts regarding what any of those practices might be. The most Rimini alleges is that "Oracle has provided [unspecified] false and misleading information about Rimini Street to customers with which Rimini Street had established a potential business relationship." (*Id.*) Nothing in Rimini's third cause of action goes substantively beyond anything in its first two causes of action.

III. ARGUMENT

Under Rule 8, a pleading may survive a motion to dismiss only if, taking all well-pleaded factual allegations as true, it contains enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court applies a two-step approach to determine the validity of claims or counterclaims. *Id.* at 1950. First, the Court must identify and disregard any "allegations in the complaint that are not entitled to the assumption of truth." *Id.* at 1951. Allegations in this category include any "legal conclusion couched as a factual allegation" and threadbare, formulaic "recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* at 1949-50. Second, the Court must evaluate any well-pleaded allegations – that is, those that are not disregarded under the first step of the test – and "determine if they plausibly suggest an entitlement to relief." *Id.* at 1951.

The Supreme Court explained the plausibility standard as follows:

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

Id. at 1949 (internal citations omitted).

A. Rimini’s First Cause of Action Fails to State a Claim

Rimini’s first cause of action, for “defamation, business disparagement, and trade libel,” should be dismissed. Rimini conflates two distinct torts: defamation and trade libel (also known as business or product “disparagement”).² Rimini also does not specify whether it asserts that California state law or Nevada state law applies. Regardless of which label properly applies or which state’s law applies,³ Rimini must plead facts that establish the publication of a false statement of fact. *See Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346, 351 (9th Cir. 1998) (California trade libel); *Taus v. Loftus*, 40 Cal. 4th 683, 720 (2007) (California defamation); *Clark County*, 213 P.3d at 504 (Nevada trade libel); *Pope v. Motel 6*, 114 P.3d 277, 282 (Nev. 2005) (Nevada defamation).

Rimini’s claim fails. First, Rimini’s general allegations of unspecified “defamatory statements” fail as a matter of law because Rimini must allege the substance of particular alleged

² Rimini’s counterclaim does not reveal which cause of action it intends to assert. To the extent Rimini asserts trade libel, it fails to plead special damages, which are an element that must be pled with specificity under Rule 9(g). *See Isuzu Motors Ltd. v. Consumers Union of U.S., Inc.*, 12 F. Supp. 2d 1035, 1047 (C.D. Cal. 1998). A “bare allegation of the amount of pecuniary loss is insufficient” for pleading a trade libel claim. *Id.* Under California law, Rimini must “identify particular customers and transactions of which it was deprived as a result of the libel.” *Mann v. Quality Old Time Servs., Inc.*, 120 Cal. App. 4th 90, 109 (Cal. Ct. App. 2004); *Isuzu Motors*, 12 F. Supp. 2d at 1047. Under Nevada law, Rimini must allege facts showing a “general business decline” that is the “result of the disparaging statements and the plaintiff must eliminate other potential causes.” *Clark County Sch. Dist. v. Virtual Educ. Software, Inc.*, 213 P.3d 496, 505 (Nev. 2009). Here, Rimini merely alleges: “On information and belief, Oracle’s false and disparaging statements regarding Rimini Street’s business have directly led to economic loss on the part of Rimini Street through specific loss of sales, as well as a general decline in the growth of Rimini Street’s business.” (CC ¶ 58.) This conclusory allegation fails as a matter of law.

³ Nevada conflict-of-laws analysis may result in different bodies of law applying to the claim and various defenses. *Dictor v. Creative Mgmt. Servs., LLC*, 223 P.3d 332, 335-36 & n.5 (Nev. 2010). This memorandum cites both California and Nevada authority and shows that Rimini’s counterclaims fail under any body of law.

statements. Second, although Rimini attempts to allege four specific statements, none of them supports a claim because each of the alleged statements is non-actionable opinion. In addition, at least one of the four statements – Oracle’s repetition to the press of its position in this lawsuit – is absolutely protected by the litigation privilege.

1. Rimini’s Generalized Allegations Cannot Support a Claim

To state a claim, Rimini must plead the substance of the allegedly defamatory statement. Even before the Supreme Court added bite to the Rule 8 pleading standard in *Twombly* and *Iqbal*, federal cases applying California law consistently held that “[t]he words constituting a libel or slander must be specifically identified, if not pleaded verbatim.” *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F. Supp. 1303, 1314 (N.D. Cal. 1997) (internal citation omitted); accord *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1216 (C.D. Cal. 2004) (“Even under liberal federal pleading standards, general allegations of the defamatory statements which do not identify the substance of what was said are insufficient.”) (internal citation omitted); see also *Scott v. Solano County Health & Soc. Servs. Dep’t*, 459 F. Supp. 2d 959, 973 (E.D. Cal. 2006). The same – or higher – demands are made of California trade libel in federal court. *First Advantage Background Servs. Corp. v. Private Eyes, Inc.*, 569 F. Supp. 2d 929, 937-38 (N.D. Cal. 2008).⁴ And the cases applying Nevada law are in accord. See *Blanck v. Hager*, 360 F. Supp. 2d 1137, 1160 (D. Nev. 2005) (requiring plaintiff to “allege the specific statements constituting defamation”).⁵

While Rimini’s Counterclaim makes reference to unspecified “defamatory statements”

⁴ Federal pleading standards govern this case, but the state standard “is highly relevant” to determining whether a false statement is adequately pled. *Church of Scientology of Cal. v. Flynn*, 744 F.2d 694, 696 n.2 (9th Cir. 1984).

⁵ Moreover, following the clarification in *Twombly*, 550 U.S. at 570, and *Iqbal*, 129 S. Ct. at 1949, that a complaint must plead facts showing that a claim is “plausible,” it is clear that any defamation or trade libel claim in federal court must plead the substance of the allegedly wrongful statement: “Without any information whatsoever about the actual words that were allegedly used, neither the Court nor defendants can assess whether plaintiff has stated a plausible claim for relief sufficient to support an inference of liability.” *Ghawanmeh v. Islamic Saudi Acad.*, 672 F. Supp. 2d 3, 20 (D.D.C. 2009).

1 and “incendiary and unfounded allegations,” these general allegations cannot support a claim
 2 because they fail to identify the substance of the allegedly defamatory statements. *See, e.g.,*
 3 *Jacobson*, 357 F. Supp. 2d at 1215 (“because the plaintiff fails to identify and state the substance
 4 of the allegedly defamatory statement, the defamation claim is insufficient”). In recognition of
 5 this, Rimini makes a futile attempt to allege specific defamatory statements. But its reliance on
 6 these alleged statements fails as a matter of law as well.

7 2. The Only Specified Statements Are Non-Actionable Opinion

8 Each of the alleged statements actually identified by Rimini suffers from a fatal flaw: it
 9 reflects opinions, not facts. Pure opinion is protected by the First Amendment and cannot form
 10 the basis for a defamation or trade libel claim. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1,
 11 18-19 (1990); *Partington v. Bugliosi*, 56 F.3d 1147, 1152-53 (9th Cir. 1995); *see also*
 12 *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1010-11 (Cal. Ct. App. 2001) (“Since
 13 mere opinions cannot by definition be false statements of fact, opinions will not support a cause
 14 of action for trade libel.”); *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 87 (Nev. 2002)
 15 (“statements of opinion as opposed to statements of fact are not actionable”) (citation omitted).

16 The issue is properly resolved on the pleadings because “whether an allegedly
 17 defamatory statement constitutes fact or opinion is a question of law for the court to decide.”
 18 *Rodriguez v. Panayiotou*, 314 F.3d 979, 985 (9th Cir. 2002). “To defeat the motion to dismiss,
 19 plaintiff must show that the statement is reasonably capable of sustaining a defamatory meaning,
 20 and is not comment within the ambit of the First Amendment.” *Cochran v. NYP Holdings, Inc.*,
 21 58 F. Supp. 2d 1113, 1121 (C.D. Cal. 1998) (Wardlaw, J.), *aff’d*, 210 F.3d 1036 (9th Cir. 2000)
 22 (adopting district court opinion). “In determining whether a statement is actionable, ‘the court
 23 must ask ‘whether a reasonable person would be likely to understand the remark as an expression
 24 of the source’s opinion or as a statement of existing fact.’” *Flowers v. Carville*, 266 F. Supp. 2d
 25 1245, 1251-52 (D. Nev. 2003) (quoting *Pegasus*, 57 P.3d at 88); *see also ZL Techns. Inc. v.*
 26 *Gartner Inc.*, ___ F. Supp. 2d ___, No. CV 09-02393, 2010 WL 1801582, at *10-*11 (N.D. Cal.
 27 May 3, 2010) (granting motion to dismiss because alleged defamatory statements were pure
 28

1 opinion).⁶

2 As shown below, each of the alleged statements on which Rimini bases its counterclaim
3 is either (or both) (i) a prediction of the future or (ii) a legal conclusion expressed by a non-
4 lawyer. Both types of statements are non-actionable opinions as a matter of law.

5 **a. Predictions of the Future**

6 Rimini alleges predictions of the future which are, necessarily, opinion. For example, in
7 *Uline, Inc. v. JIT Packaging, Inc.*, 437 F. Supp. 2d 793, 803 (N.D. Ill. 2006), the court analyzed a
8 representation that defendant JIT “was in or was about to be in financial trouble,” and held this
9 statement non-actionable as a matter of law. The court reasoned that the statement was “an
10 opinion as to JIT’s future financial status, and is therefore not actionable as defamation since a
11 prediction of future events can neither be true nor false.” *Id.*; *accord Republic Tobacco L.P. v.*
12 *North Atl. Trading Co.*, No. 06-C-2738, 2007 WL 1424093, at *12 (N.D. Ill. May 10, 2007)
13 (similar); *see also Gillespie v. AST Sportswear, Inc.*, No. 97 Civ. 1911, 1998 WL 289681, at *3
14 (S.D.N.Y. June 4, 1998) (“[A]ny prediction of the outcome of their prospective relationship had
15 to have been speculative rather than factual. There is no possibility of determining whether the
16 comment is true or false.”).

17 Here, Rimini alleges that Oracle representatives asserted that “Rimini Street’s business
18 model was presently unsustainable and that Rimini Street would not still be in business in two
19 years,” (CC ¶ 46) and that “Oracle had information that, when disclosed, would put Rimini Street
20 out of business.” (CC ¶ 47.) A statement that Rimini will not survive two years in the future, or
21 will go out of business on the occurrence of a future event, is a prediction of something that has
22

23 ⁶ While objective facts implied by statements of opinion may, in some circumstances,
24 give rise to a claim, here the opinion statements alleged by Rimini do not imply any specific
25 objective fact. Thus, they cannot form the basis for a claim. *See ZL Techns.*, 2010 WL 1801582
26 at *11 (granting motion to dismiss where opinion statements “do not imply the assertion of
27 specific *objective* facts, they are not actionable – even though they undeniably rest upon a large
28 body of specific yet undisclosed facts”) (emphasis in original). Rimini fails to even allege any
specific, objective fact that it claims the alleged statements implied, such as particular Rimini
business practices that infringed Oracle’s copyrights or rendered Rimini’s business
unsustainable.

not yet happened, which “can neither be true nor false.” *Uline*, 437 F. Supp. 2d at 803. And a statement that Rimini’s business is “presently unsustainable” is likewise a prediction regarding the future of Rimini’s business; it cannot mean anything other than the speaker’s opinion about what the future holds. Rimini alleges that the statement about sustainability “was presented . . . as assertions of actual fact,” (CC ¶ 46), but this bare legal conclusion does not make it so. That which has not yet occurred cannot be a fact.

b. Legal Conclusions by Non-Lawyers

Rimini also attempts to portray expressions of the law as defamatory, but such alleged statements by a non-lawyer are non-actionable opinion as a matter of law. For example, in *Rodriguez*, 314 F.3d at 981-82, the plaintiff, a police officer, sued musician George Michael after Michael suggested that plaintiff had entrapped him. The court rejected that claim, holding that Michael’s comments “constitute his interpretation of the law. . . . [A]s a layperson, Michael’s allegations of entrapment cannot constitute defamation under California law.” *Id.* at 986; *see also Freecycle Network, Inc. v. Oey*, 505 F.3d 898, 905 (9th Cir. 2007) (assertion that defendant “lacked trademark rights . . . cannot be considered a false statement of fact”); *Coastal Abstract Serv., Inc. v. First American Title Ins. Co.*, 173 F.3d 725, 731-32 (9th Cir. 1999) (rejecting claim based on statement that plaintiff was acting illegally by operating without a license because “[a]bsent a clear and unambiguous ruling from a court or agency of competent jurisdiction, statements by laypersons that purport to interpret the meaning of a statute or regulation are opinion statements, and not statements of fact.”)

Here, Rimini’s counterclaim rests on allegations that Oracle representatives have accused Rimini of violating Oracle’s intellectual property rights. (*E.g.*, CC ¶¶ 45 (“‘massive theft’ of Oracle’s intellectual property”); *id.* ¶ 48 (“allegations of illegality”).) Rimini does not allege that any of the statements were made by lawyers. Just as George Michael’s out-of-court allegation of entrapment “constitutes his interpretation of the law” and “cannot constitute defamation,” *Rodriguez*, 314 F.3d at 986, the purported allegations that Rimini infringed Oracle’s intellectual property likewise constitute the speakers’ interpretation of the law and cannot constitute defamation.

3. Rimini Alleges Conduct Protected by the Litigation Privilege

Relatedly, Rimini alleges conduct that is also protected by the litigation privilege. The privilege is absolute, and immunizes “participants from liability for torts arising from communications made during judicial proceedings.” *Silberg v. Anderson*, 50 Cal. 3d 205, 214 (1990) (citing Cal. Civil Code § 47); *accord Clark County*, 213 P.3d at 499, 502 & n.3 (same under Nevada law). Indeed, this privilege is “the backbone to an effective and smoothly operating judicial system.” *Silberg*, 50 Cal. 3d at 215 (internal citation omitted). The privilege extends to “fair and true” reports to the media about litigation. *See Microsoft Corp. v. Yokohama Telecom Corp.*, 993 F. Supp. 782, 784-85 (C.D. Cal. 1998) (privilege extends to “a communication to” a “public journal”) (quoting Cal. Civ. Code § 47(d)). “In crafting their treatment of the ‘fair and true’ issue, the courts have recognized the importance of protecting a free and vigorous press.” *Dorsey v. Nat’l Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir. 1992) (citation omitted). A “fair and true” statement “need not resolve the merits of the charges or even present the defendant’s version of the facts.” *Microsoft*, 993 F. Supp. at 785. The statement must merely must capture the “gist or sting” of the litigation. *Dorsey*, 973 F.2d at 1436 (citation omitted.) A statement that “does not produce a different effect on the reader than would reading the complaint” is a “fair and true” report. *Microsoft*, 993 F. Supp. at 784.

Here, Rimini attempts to base a claim on alleged statements by Oracle spokesperson Deborah Hellinger to the press. As a matter of law, these alleged statements are fair and true reports about this litigation. (CC ¶ 45.) The alleged quotation from Ms. Hellinger simply describes Oracle’s claim this matter: “The massive theft that Rimini and Mr. Ravin engaged in is not healthy competition. We will prove this in court.” (Declaration of Kieran Ringgenberg Ex. A.) Oracle’s Complaint alleges that Rimini and Mr. Ravin engaged in “massive theft” of Oracle’s intellectual property (AC ¶ 5), which is exactly what Ms. Hellinger is reported to have said. (CC ¶ 45.) Reading the press reports would have no different effect than reading the Complaint, and Rimini’s claim based on these statements is barred by the litigation privilege.

1 *E.g., Microsoft*, 993 F. Supp. at 784-85.⁷

2 **B. Rimini Fails to State a Copyright Misuse Defense**

3 Rimini's second cause of action, which seeks a declaratory judgment as to its affirmative
4 defense of copyright misuse, suffers from two dispositive weaknesses. First, Rimini fails to
5 allege any conduct that could be copyright misuse because all Rimini alleges is that Oracle
6 restricts copying and use of Oracle's copyrighted works – precisely what the Copyright Act
7 authorizes a copyright holder to do. Rimini does not allege that Oracle's licenses prevent Rimini
8 from developing any new work or product. Nor does Rimini allege that Oracle requires its
9 customers to agree to deal only with Oracle. In the absence of such allegations, the counterclaim
10 does not allege a defense of copyright misuse. Second, even if Rimini's copyright misuse theory
11 were viable – and it is not – Rimini alleges only conclusions, not facts, in support of its claim
12 that Oracle's practices "effectively" require customers to purchase support only from Oracle.
13 And those conclusory allegations are inconsistent with Rimini's allegations of its own success in
14 luring Oracle customers to switch to Rimini.

15 **1. Restrictions on Access and Use of Copyrighted Materials Are Not 16 Misuse of Copyright**

17 The essence of the grant of copyright is the "exclusive right" to exploit the work,
18 including the rights to "reproduce" the work, "distribute copies," and "prepare derivative works
19 based upon the copyrighted work." 17 U.S.C. § 106. In this way, "copyright law *celebrates* the
20 profit motive, recognizing that the incentive to profit from the exploitation of copyrights will

21 ⁷ Similarly, the *Noerr-Pennington* doctrine derives from the First Amendment's
22 guarantee of the right to petition, and holds that "those who petition any department of the
23 government for redress are generally immune" from liability for those acts. *Sosa v. DIRECTV, Inc.*,
24 437 F.3d 923, 929 (9th Cir. 2006). The litigation privilege and the *Noerr-Pennington*
25 doctrine also extend to communications outside of litigation but closely related to it, such as pre-
26 litigation demand letters. *See, e.g., Sosa*, 437 F.3d at 936-37 (affirming dismissal of claims
27 based on *Noerr-Pennington* protections for pre-litigation communications); *Aronson v. Kinsella*, 58
28 Cal. App. 4th 254, 261-68 (Cal. Ct. App. 1997) (applying California litigation privilege to
protect pre-litigation communications); *Clark County*, 213 P.3d at 499, 502 (applying Nevada
litigation privilege to protect pre-litigation communications). To the extent Rimini attempts to
base its claim on the Complaint or such pre-litigation communications, it is also barred. *See,*
e.g., Sosa, 437 F.3d at 940-42 (affirming dismissal of claims based on conduct protected by
Noerr-Pennington where claimant failed to plead any applicable exception).

redound to the public benefit by resulting in the proliferation of knowledge.” *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (citation omitted) (emphasis in original).

The equitable defense of copyright misuse “prevents copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001). By contrast, it is not misuse to exercise the “exclusive rights of copyright holder,” including by “refusing to license a copyrighted work or by doing so only on terms that the copyright owner finds acceptable.” *Id.* at 1027 (quoting *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000)); accord *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 997 (C.D. Cal. 2006) (“a copyright is not improperly expanded simply because the owner has exercised his or her power to exclude”).

In particular, misuse has been found where a copyright holder (1) unreasonably restricts the *development* of a new, non-infringing work or a competing product, or (2) explicitly and unreasonably prohibits licensees from *using* competing products or requires licensees to use non-copyrighted works.⁸ See, e.g., *Practice Mgmt. Info. Corp. v. American Med. Ass’n*, 121 F.3d 516, 521 (9th Cir. 1997) (“Conditioning the license on [licensee’s] promise not to use competitor’s products constituted a misuse of the copyright.”); *Lasercomb*, 911 F.2d at 976-79 (license barred licensee from developing competing products for ninety-nine years).⁹

⁸ Even where a license contains such a restriction, some courts will find misuse only if the restriction also “undermine[s] the Constitution’s goal of promoting invention and creative expression.” *Grokster*, 454 F. Supp. 2d at 995. This is because license restrictions are misuse only if they are “violative of the public policy embodied in a grant of copyright,” *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990) (emphasis supplied), not simply because they may be violative of some general concept of “public policy.” See *Grokster*, 454 F. Supp. 2d at 995 (holding that “[t]here has to be a sufficient nexus between the alleged anti-competitive leveraging and the policy of the copyright laws”). Rimini has not alleged that Oracle’s licenses impair its ability to invent or create; it simply alleges that the licenses make it more difficult for Rimini to provide service to Oracle customers in competition with Oracle.

⁹ The Fourth Circuit in *Lasercomb*, *id.* at 978, was the first court of appeals decision to recognize copyright misuse; the Ninth, Third, Fifth, and Seventh Circuits have since followed suit. *Grokster*, 454 F. Supp. 2d at 994-95 (citing cases). The Third, Fourth, Fifth and Ninth Circuits follow *Lasercomb*’s approach, which asks whether the copyright holder has used the copyright in a manner “violative of the public policy embodied in the grant of a copyright.”

(Footnote Continued on Next Page.)

1 For example, in *In re Napster*, 191 F. Supp. 2d 1087, 1106 (N.D. Cal. 2002), several
 2 record companies formed a joint venture, MusicNet, to offer digital music licenses for their
 3 works. MusicNet offered Napster a license containing a restriction which prohibited Napster
 4 from obtaining music from any other sources, including through a period of outright contractual
 5 exclusivity. As the court explained, “[t]he critical issue is that MusicNet binds Napster to obtain
 6 licenses from MusicNet and not its competitors.” *Id.* at 1107. The court permitted Napster to
 7 proceed on a theory that, by explicitly restricting Napster’s ability to acquire music from other
 8 licensors, MusicNet had impermissibly extended its copyrights to control the licensing of music
 9 created and copyrighted by others.

10 On the other hand, a license that does not prevent the creation of new works or products
 11 and that controls only the access to or use of the copyrighted product cannot be the basis for a
 12 misuse defense, even if infringers might find it easier to compete against the copyright holder in
 13 the absence of those restrictions. For example, in *Apple, Inc. v. Psystar Corp.*, 673 F. Supp. 2d
 14 931, 933 (N.D. Cal. 2009), Apple’s licenses permitted its Mac OS X software to be used only on
 15 Apple computers, and prohibited use on computers sold by Psystar (which were designed and
 16 sold to be used with Apple software). Although this restriction made it more difficult for Psystar
 17 to sell computers in competition with Apple, the court rejected a misuse defense: “Apple has not
 18 prohibited purchasers of Mac OS X from *using* competitor’s products. Rather, Apple has simply
 19 prohibited purchasers from using Mac OS X *on* competitor’s products.” *Id.* at 940 (emphasis in
 20 original). This was well within Apple’s statutory rights, and therefore not misuse. *Id.*; *see also*
 21 *A&M Records*, 239 F.3d at 1027 (no copyright misuse where defendants failed to show that
 22 “plaintiffs seek to control areas outside of their grant of monopoly”).

23 Thus, courts “have summarily rejected the copyright abuse defense where the copyright

24 _____
 (Footnote Continued from Previous Page.)

25 *Lasercomb*, 911 F.2d at 978. The Seventh Circuit, by contrast, has looked to whether the
 26 copyright holder has violated antitrust laws and, in dicta, has also considered adopting an abuse-
 27 of-process standard, where an attempt to bring a copyright infringement suit to protect an
 28 uncopyrightable product would be misuse. *Assessment Techs. of WI, LLC v. WIREdata, Inc.*,
 350 F.3d 640, 647 (7th Cir. 2003).

owner did not prohibit its licensees from either using or independently developing a competing product.” *Microsoft Corp. v. Computer Support Servs. of Carolina, Inc.*, 123 F. Supp. 2d 945, 955-56 (W.D.N.C. 2000) (granting motion to strike affirmative defense of copyright misuse); *see also MDY Industries, LLC v. Blizzard Entm’t Inc.*, No. CV-06-2555, 2008 WL 2757357, at *7 (D. Ariz. Jul. 14, 2008) (“while [plaintiff] has limited the license . . . there is no evidence [plaintiff] has sought to bar third parties from developing competing games”); *Psystar*, 673 F. Supp. 2d at 940 (“Apple has not prohibited others from independently developing and using their own operating systems. Thus, Apple did not violate the public policy underlying copyright law or engage in copyright misuse.”); *Microsoft Corp. v. BEC Computer Co.*, 818 F. Supp. 1313, 1316-17 (C.D. Cal. 1992) (striking affirmative defense of copyright misuse where the copyright owner did not prohibit development or use of competing products); *compare, e.g., Practice Mgmt.*, 121 F.3d at 520-21 (finding misuse where license required customer to forgo use of all competing products).

2. Rimini’s Misuse Defense Fails Because It Alleges Only Restrictions on Access and Use of Copyrighted Works

Applying this rule, the Ninth Circuit and other courts have rejected copyright misuse claims closely analogous to Rimini’s claim here. In *Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330 (9th Cir. 1995), *overruled on other grounds by Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 210 (1999), the third-party computer software and hardware service provider Southeastern accused Triad of copyright misuse. The court rejected that claim because Triad “did not attempt to prohibit Southeastern or any other [third-party service provider] from developing its own service software to compete with Triad,” but merely prevented the defendant from using Triad’s software to “get[] a free ride” when servicing systems sold by Triad. *Triad*, 64 F.3d at 1337.¹⁰

¹⁰ *Triad* preceded the Ninth Circuit’s formal adoption of the copyright misuse defense in *Practice Management*. However, *Practice Management* cited *Triad* approvingly on this point, and *Practice Management*, *Triad*, and *BEC Computer* all apply and follow the legal standard articulated in *Lasercomb*.

Moreover, in rejecting the copyright misuse defense, the *Triad* court followed the decision in *Advanced Computer Services of Michigan, Inc. v. MAI Systems Corp.*, 845 F. Supp. 356 (E.D. Va. 1994). Defendant MAI made and licensed computers and software. Its license agreements' restriction against making the software "available to others" effectively prohibited competitive service providers from even *turning on* the computers at issue, making it entirely impossible for those competitive providers to service customers' computers without violating MAI's copyrights. *Id.* at 361 n.6, 366-67. Nonetheless, MAI's license agreements were not copyright misuse. The licenses did not "prevent the alleged infringer from developing competing software," *id.* at 367, and instead represented MAI's valid attempt "to protect the rights accruing to it as the holder of valid copyrights in its software," that is, restrictions on copying and use. *Id.* at 370; *see also Psystar*, 673 F. Supp. 2d at 940 (rejecting misuse claim based on license that prevented software from being used on competitor's computers).

This line of cases – including *Triad*, *Advanced Computer*, and *Psystar* – shows why Rimini's misuse claim fails as a matter of law. In each of those cases, the copyright holder had in place restrictions on infringing access and use of copyrighted works which did not prohibit the development of competitive works, and which did not expressly prohibit a licensee from doing business with a competitor. Nonetheless, in each case, the restrictions had the *effect* of making it harder – if not impossible – to compete against the copyright holder. *Triad*, 64 F.3d at 1337 (infringer offered competing service dependent on copied software); *Advanced Computer*, 845 F. Supp. at 370 (infringer offered competing service dependent on copied software); *see also Psystar*, 673 F. Supp. 2d at 940 (infringer offered competing hardware product dependent on copied software). And, in each case, the misuse defense was rejected.

Rimini's copyright misuse allegations fail for the same reason. Each of the two license restrictions alleged by Rimini is well within Oracle's statutory rights as a copyright holder. First, the alleged limits on massive automated downloads of Oracle Software and Support Materials (CC ¶ 64) falls squarely within the scope of Oracle's rights "to control reproduction and distribution of . . . copyrighted works, exclusive rights of copyright holders." *A&M Records*, 239 F.3d at 1027 (citing 17 U.S.C. § 106). Second, the alleged limitation of downloads to those

1 in furtherance of the customer’s relationship with Oracle is, as the counterclaim acknowledges,
 2 merely a restriction on customers’ “access to and download of support materials,” (CC ¶ 64), and
 3 thus falls within Oracle’s rights to control distribution of its copyrighted material.

4 Rimini’s assertion that these alleged restrictions “effectively” prevent customers from
 5 using third-party support providers like Rimini, (*id.* ¶ 64), cannot salvage Rimini’s claim.
 6 Rimini has not alleged any term of an Oracle agreement that bars Rimini from developing
 7 competing creative works or requires customers to agree not to do business with Rimini. Indeed,
 8 Rimini *admits* that Oracle does not prohibit the use or development of a competing product or
 9 service. (*Id.* ¶ 62.) Thus, regardless of the supposed “effect” of Oracle’s alleged restrictions on
 10 Rimini’s ability to provide a service to Oracle’s customers, Oracle has not engaged in misuse.
 11 *E.g.*, *Psystar*, 673 F. Supp. 2d at 940 (“Apple’s agreement simply attempts to control the use of
 12 Apple’s own software – an area that is the *focus* of the copyright”) (emphasis in original);
 13 *Advanced Computer*, 845 F. Supp. at 370 (“MAI has not incorporated overbroad noncompetition
 14 clauses in its licensing agreements. . . . MAI is simply attempting to protect the rights accruing to
 15 it as the holder of valid copyrights in its software.”).

16 Sound reasons support the settled rule barring a misuse defense based only on a license’s
 17 “effect” on a third party’s ability to compete. Rimini’s theory is that it is “effectively” unable to
 18 offer an attractive service in competition with Oracle without unlicensed access to Oracle’s
 19 copyrighted material. Rimini wants unlicensed access to Oracle’s works so that Rimini can use
 20 Oracle’s own works to offer a service to Oracle’s customers at cut rates. Rimini’s inability to
 21 compete without unfettered access to Oracle’s copyrighted works simply reflects the massive
 22 investment Oracle has made in its works, the resulting appeal of those works, and Rimini’s
 23 failure to develop and to offer an adequate substitute of its own.

24 Copyright policy does not protect those like Rimini who, unburdened by the expense of creating
 25 a copyrighted work, seek to use that same work to offer a service on the cheap. In *Advanced*
 26 *Computer*, the court refused to permit low-cost providers of technical support for MAI
 27 computers to use MAI’s support software to provide their competing service. Rejecting the low-
 28 cost providers’ misuse defense, the court held that it was not “contrary to public policy that MAI

charges higher servicing fees than plaintiffs” because MAI had “made an investment” in its software which it may “legitimately seek to recoup.” *Id.* at 367; *see also Psystar*, 673 F. Supp. 2d at 930-40 (no misuse where Apple license effectively prohibited competitor from selling lower-cost computers that used Apple software).

The “economic philosophy” of copyright “is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.” *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *see also Eldred*, 537 U.S. at 212 n.18 (“[C]opyright law serves public ends by providing individuals with an incentive to pursue private ones.”). It would stand that policy (and the Copyright Act itself) on its head to use the very success and appeal of Oracle’s copyrighted works, and Rimini’s very failure to develop its own alternatives, as the basis to declare that Oracle cannot enforce its copyrights. It is Rimini’s theory, not Oracle’s conduct, that is truly violative of the public policy embodied in a grant of copyright.

3. Rimini’s Conclusory Allegation that Oracle’s Licenses “Effectively” Prevent Customers from Using Third-Party Support Fails on the Facts Alleged by Rimini Itself and the Law

Rimini’s copyright misuse counterclaim also fails because it is based entirely on conclusory allegations, is disproved by Rimini’s own allegations elsewhere in the Counterclaim, and therefore fails to “plausibly suggest an entitlement to relief.” *Iqbal*, 129 S. Ct. at 1951.

As discussed above, Rimini does not allege that Oracle *explicitly* requires its customers to forgo third-party support, but instead asserts that Oracle is “effectively requiring [customers] to . . . continue purchasing after-market support only from Oracle.” (CC ¶ 64.) But Rimini alleges absolutely no facts to show that its ability to provide competing service has in fact been “effectively” restrained. On a motion to dismiss, the court need not accept a “legal conclusion couched as a factual allegation” or threadbare, formulaic “recitals of the elements of a cause of action, supported by mere conclusory statements.” *Iqbal*, 129 S. Ct. at 1949-50. Lacking “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” the copyright misuse allegations fail to satisfy Rule 8 and must be dismissed. *Id.* at 1949.

Moreover, Rimini alleges facts that undermine its conclusory allegations. Rimini alleges that it does not infringe Oracle's copyrights, and that it need not infringe Oracle's copyrights in order to offer a better service at half the price. (CC ¶¶ 2, 8, 50.) Rimini goes so far as to argue that it would be "malicious" and "baseless" to assert that Rimini has infringed Oracle's copyrights. (CC ¶¶ 2, 8, 50.) Rimini further claims that "[h]undreds" of customers have "already made the switch to Rimini," and that it has enjoyed tremendous growth in terms of revenues and customers. (CC ¶¶ 10-11, 13-18.)

If, as Rimini alleges, it does not infringe Oracle's copyrights, and if, as Rimini alleges, it has succeeded in convincing hundreds of customers to switch to Rimini – despite Oracle's licensing practices – then Oracle's licensing practices cannot be "effectively" preventing customers from switching to Rimini. (*Id.* ¶ 64.) Simply put, Rimini's own allegations make not only implausible but impossible the claim that Oracle has "effectively" foreclosed customers from switching to Rimini. This requires dismissal of Rimini's claim. *See Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997) ("A plaintiff may plead herself out of court. If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts.") (internal citation omitted).

4. Rimini's Copyright Misuse Affirmative Defense Should Be Stricken

Rimini also pleads copyright misuse as its Fourth Affirmative Defense. Affirmative defenses are governed by the same pleading standard as complaints. *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir. 1979). An affirmative defense may be stricken pursuant to Rule 12(f) "when the defense is insufficient as a matter of law." *Multimedia Patent Trust v. Microsoft Corp.*, 525 F. Supp. 2d 1200, 1211 (S.D. Cal. 2007).

In asserting its misuse affirmative defense, Rimini expressly relies on the allegations of the Counterclaim. (Answer at 24) ("[a]s explained by Rimini Street's Second Counterclaim"). As shown above, the counterclaim for declaratory judgment on the defense of misuse fails as a matter of law. For the same reasons, the Fourth Affirmative Defense should be stricken as well. *See, e.g., Computer Support*, 123 F. Supp. 2d at 955-56 (granting motion to strike misuse

1 defense).

2 **C. Rimini Fails to State a Claim Under California’s Unfair Competition Law**

3 Finally, Rimini brings suit under California’s Unfair Competition Law (“UCL”), Cal.
 4 Bus. & Prof. Code § 17200 *et seq.* The UCL provides a cause of action for business practices
 5 that are (i) unfair, (ii) fraudulent, and/or (iii) unlawful, but a claimant must “state with
 6 reasonable particularity the facts supporting the statutory elements of the violation.” *Saldate v.*
 7 *Wilshire Credit Corp.*, ___ F.R.D. ___, No. CV-F-09-2089-LJO-SMS, 2010 WL 582069, at *14
 8 (E.D. Cal. Feb. 12, 2010) (quoting *Khoury v. Maly’s of Cal., Inc.*, 14 Cal. App. 4th 612, 619
 9 (Cal. Ct. App. 1993); *accord Fortaleza v. PNC Fin. Servs. Group, Inc.*, 642 F. Supp. 2d 1012,
 10 1019 (N.D. Cal. 2009). Rimini makes no effort to state a claim under the “unfair” prong, and its
 11 allegations are insufficient to state a claim under the “fraudulent” and “unlawful” prongs.¹¹

12 First, Rimini fails to adequately allege “fraudulent” conduct. Rimini’s UCL claim asserts
 13 that Oracle has made unspecified “false and misleading statements,” provided unspecified “false
 14 and misleading information about Rimini Street” to potential customers, and has caused
 15 unspecified “false and disparaging allegations to be published and republished.” (CC ¶ 71.)
 16 These allegations fall short of the specificity required to assert a claim.

17 Because Rimini’s UCL claim is based on allegedly false representations, the claim must
 18 satisfy the pleading requirements of Federal Rule of Civil Procedure 9(b). *See Kearns v. Ford*
 19 *Motor Co.*, 567 F.3d 1120, 1125-26 (9th Cir. 2009); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
 20 1097, 1105-06 (9th Cir. 2003). Rule 9(b) requires the pleader to allege the “time, place, and
 21 specific content of the false representations as well as the identities of the parties to the
 22 misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal citation
 23 omitted). No statement specifically referenced in Rimini’s third cause of action is alleged with
 24 _____

25 ¹¹ The Counterclaim asserts only “unlawful and/or fraudulent,” and not “unfair,” conduct.
 26 (CC ¶¶ 70, 72.) Indeed, in competitor cases such as this one, conduct is “unfair” under the UCL
 27 only if it “threatens an incipient violation of an antitrust law, or violates the policy or spirit of
 28 one of those laws because its effects are comparable to or the same as a violation of the law, or
 otherwise significantly threatens or harms competition.” *Cel-Tech Commc’ns, Inc. v. Los*
Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187 (Cal. 1999). Rimini alleges nothing like that.

1 anything approaching this specificity, and thus none supports a claim. *See Kearns*, 567 F.3d at
2 1126-27 (affirming dismissal of UCL claim based on “concealment” because “general pleadings
3 do not satisfy the heightened pleading requirements of Rule 9(b)”).

4 To the extent Rimini’s “fraudulent” conduct claim is based on the alleged representations
5 underlying its defamation claim, such claim fails for the same reasons as the defamation claim.
6 As explained above, the alleged statements referenced in Rimini’s defamation claim are non-
7 actionable opinion, *see* Section III.B.2; *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 621 (9th
8 Cir. 2004) (expressions of opinion, including misrepresentations of law, are not actionable as
9 fraud), and are protected by the litigation privilege, *see* Section III.B.3.

10 Second, Rimini does not adequately allege any “unlawful” conduct. The “unlawful”
11 prong of the UCL “borrows violations of other laws and treats them as unlawful practices that
12 the unfair competition law makes independently actionable.” *Cel-Tech*, 20 Cal. 4th at 180.
13 Rimini fails to identify any specific statute or regulation that it contends has been violated. To
14 the extent Rimini attempts to base an unlawful claim on its tort or copyright misuse claims, its
15 UCL claim fails for the same reasons as the tort and copyright misuse defense (as shown above
16 in Part III.A and III.B). *See Rubio v. Capital One Bank (USA), N.A.*, 572 F. Supp. 2d 1157, 1168
17 (C.D. Cal. 2008) (“Where a plaintiff cannot state a claim under the ‘borrowed’ law, she cannot
18 state a UCL claim either.”). Moreover, alleged copyright misuse in particular cannot be a basis
19 for a determination that conduct is “unlawful” because copyright misuse is merely an affirmative
20 defense (as to which Rimini itself seeks merely a declaration), not a basis for an independent
21 claim. *See Ticketmaster LLC v. RMG Techs., Inc.*, 536 F. Supp. 2d 1191, 1198 (C.D. Cal. 2008).

22 For all of these reasons, Rimini fails to state a claim under any prong of the UCL, and its
23 third cause of action should be dismissed.

1 **IV. CONCLUSION**

2 For the foregoing reasons, Rimini's three counterclaims should be dismissed and its
3 Fourth Affirmative Defense stricken.

4
5 DATED: June 10, 2010

BOIES SCHILLER & FLEXNER LLP

6
7 By: /s/ Kieran P. Ringgenberg
8 Kieran P. Ringgenberg
9 Attorneys for Plaintiffs
Oracle USA, Inc., Oracle America, Inc.,
and Oracle International Corp.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of June, 2010, I electronically transmitted the foregoing **PLAINTIFFS ORACLE USA, INC., ORACLE AMERICA, INC., AND ORACLE INTERNATIONAL CORPORATION'S MOTION TO DISMISS COUNTERCLAIMS AND STRIKE AFFIRMATIVE DEFENSE** to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel in this matter; all counsel being registered to receive Electronic Filing.

By: /s/ Catherine T. Duong
An employee of Boies, Schiller & Flexner LLP